RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

TC HEARTLAND LLC,

Petitioner,

v.

KRAFT FOOD BRANDS GROUP LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF DELL INC. AND THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Dell Inc. is a leading technology company, and has substantial interests in restoring the statutory limits on patent venue and ameliorating the forum shopping that has infected patent litigation for two and a half decades.

Dell Inc. and EMC Corporation recently merged, creating a new, combined company known to the world as Dell Technologies. The combined entity, one of the world's largest technology companies, sells products including personal computers, servers, enterprise storage systems, and computer and network security products.

Dell owns more than 20,000 patents and applications worldwide and recognizes the importance of protecting valid intellectual property rights.

Dell is a Delaware corporation, headquartered in Round Rock, Texas. Its enterprise storage division, Dell EMC, is headquartered in Hopkinton, Massachusetts, as was its predecessor, EMC Corporation.

Amicus Software & Information Industry Association ("SIIA") is the principal trade association for the software and digital information industries. The 700-plus software companies, search engine providers,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored any portion of this brief, and no person other than *amici curiae* or their counsel or members made any monetary contribution intended to fund the preparation or submission of the brief. Counsel of record received timely notice of intent to file this brief, and all parties have consented to the filing of this brief.

data and analytics firms, information service companies, and digital publishers that constitute its membership serve nearly every segment of society, including business, education, government, healthcare, and consumers. They, like Dell, also find themselves disproportionately subject to patent suits in one venue with which they have little connection beyond the happenstance that some of their products or services are sold or put to use in the jurisdiction.

Such litigation predictably is brought by "patent trolls": Dell and SIIA's members regularly are targeted by made-for-litigation entities who assert infringement of patents they do not practice. Such non-practicing entities, who may exist on paper only and who in any event typically have few or no employees to inconvenience, generally file their lawsuits in one or two hand-picked district courts with a well-earned reputation for delivering outcomes favorable to patent holders, and which have no connection to the dispute beyond the fact that a nationally distributed product was sold or used there.

Litigation in these forums often proceeds differently from litigation in other courts: Defendants typically must immediately engage in costly discovery, even if they have moved to dismiss the case in its entirety or to transfer it to another venue. Judges presiding over patent infringement cases in these courts often will proceed with advanced phases of the case, like claim construction, without rendering a decision on these early motions. When these courts eventually rule on the motions, they typically send the case to trial in their court: They deny summary judgment at disproportionately high rates and routinely refuse to transfer cases to vastly more convenient forums. And

when cases are tried to verdict, a jury that finds infringement often awards damages in eye-popping amounts.

A defendant trapped in one of these forums faces tremendous pressure to settle even transparently meritless cases. The cost of litigating a patent suit to and through trial is so substantial, and the damage awards frequently on offer in these forums are so outlandish, that many defendants will pay extortionate sums to eliminate the outsized risks associated with continuing to litigate in that forum. And those that do not settle must incur at least a cost of defense that almost invariably runs into the millions of dollars.

According patentees an unbounded choice of forum for their infringement actions thus imposes significant costs on technology companies that bring value-creating products to market—costs that hamper the ability of such companies to continue to innovate and enrich the lives of consumers. As this Court held almost six decades ago in *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222 (1957), Congress did not intend to impose these costs on defendants in patent-infringement actions.

Amici have a substantial interest in ensuring that the balance struck by Congress in 28 U.S.C. § 1400(b) is respected.

SUMMARY OF THE ARGUMENT

The present regime, characterized by its rampant and unseemly forum shopping, stems from an easy-to-correct misinterpretation of the patent venue statute. For two and a half decades, the Federal Circuit has interpreted the special patent venue statute, 28 U.S.C. § 1400(b), as eclipsed by the broader general

venue statute, 28 U.S.C. § 1391(c), even though this Court has repeatedly held that it is not. As a direct consequence, patent plaintiffs have enjoyed virtually unbounded choice of venue in patent cases. The decision below perpetuates—indeed, cements—that free-for-all, even though Congress recently amended the venue statutes in ways that undermine the Federal Circuit's stated reason for departing from this Court's precedent. This Court should review the court of appeals' resolution of the important federal question presented in the petition—a resolution which directly conflicts with decisions of this Court yet governs all patent cases—and reverse.

I. The decision below rejects this Court's settled precedent interpreting the patent venue statute as "no longer the law," even though the relevant provisions are little changed from the versions this Court already had interpreted. Pet. App. 6a.

A. Fifty-nine years ago, in *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222 (1957), this Court answered the very question presented here: "whether 28 U.S.C. § 1400(b) is the sole and exclusive provision governing venue in patent infringement actions, or whether that section is supplemented by 28 U.S.C. § 1391(c)." *Id.* at 222; *see* Pet. i. The Court held that Section 1400(b) stands alone and permits patent-infringement suits against corporations only where they are incorporated or have a regular and established course of business and committed acts of infringement. 353 U.S. at 226, 229.

B. Then, in 1990, the Federal Circuit distinguished *Fourco* on the basis of a 1988 amendment to Section 1391(c), which changed the statute's stated

sphere of applicability from "for venue purposes" to "[f]or purposes of venue under this chapter." *VE Holding Corp.* v. *Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990). The court of appeals believed this minor modification—enacted without any suggestion that a substantive effect was intended—rendered *Fourco*'s analysis of the Congress's venue statutes irrelevant and authorized that court to decide the meaning of the statute "as a matter of first impression"—which the court did, the opposite way as *Fourco*. *Ibid.*

In 2011, however, Congress amended Section 1391(c) again, restoring the pertinent language to much the same as existed when *Fourco* was decided: "for all venue purposes." Congress further clarified that Section 1391 applies "[e]xcept as otherwise provided by law." 28 U.S.C. § 1391(a). Thus, whether *VE Holding* was correct or not, Section 1391(c) now has been returned to substantially the same language as existed when *Fourco* was decided. There accordingly should be no doubt that *Fourco*'s construction of Congress's venue statutes remains the law today.

C. Under this Court's principles of *stare decisis*, *Fourco should* remain the law. Far from presenting any "special justification" for overturning *Fourco*, changes in the decades since the decision issued have confirmed that its rule remains correct. *See Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015).

II. The Federal Circuit's neglect of *Fourco* has had the fateful consequence of opening the doors of virtually every district court in the nation to infringe-

ment suits against virtually every company. The rampant and unseemly forum shopping that has followed imposes outsized costs on innovation.

A. Section 1391(c) allows the exercise of venue over a corporate defendant up to the very limits of the Due Process Clause. Reading that provision into Section 1400(b) has given patent plaintiffs a dinner menu from which they may select nearly any venue in the country to sue nearly any practicing company that sells its wares nationwide. Non-productive paper entities, known as "patent trolls," have taken full advantage of this opportunity to select the court that will hear their cases. Unsurprisingly, trolls have concentrated their suits in districts that accord them procedural and substantive advantages. Motions to transfer "[f]or the convenience of parties and witnesses, in the interest of justice" under 28 U.S.C. § 1404(a) have not cured this problem.

B. Such entrenched forum shopping contributes to many of the evils of modern patent litigation. Patent trolls select districts that are less likely to terminate litigation before trial. Not only are dispositive pre-trial motions generally unsuccessful in these forums; typically, a defendant must engage in time-consuming and expensive discovery—often including depositions of key engineers that distract them from critical functions within their company—during the pendency of the motion. The threat of facing these burdens, even when the litigation clearly lacks merit, often compels defendants to settle. Forum shopping thus hampers innovation, generates erroneous results, and undermines respect for the rule of law. Reaffirming *Fourco* would alleviate these ills and restore

the balance of convenience and fair play among patent litigants struck by Congress.

ARGUMENT

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S SETTLED INTERPRETATION OF THE PATENT VENUE STATUTE.

Ever since Congress, in the late nineteenth century, passed a restrictive patent venue statute to curb forum shopping and its attendant abuses, this Court consistently has held that a defendant corporation may not be sued in a venue where it is not incorporated if it has no regular and established place of business in that district. The Court repeatedly has explained that "where the defendant resides" (and its synonyms), as used in the special patent venue statute, means only a corporation's place of incorporation. This Court has hewed to this settled interpretation even in view of Congressional rewordings of the patent venue statute and in view of the existence of a general venue statute, 28 U.S.C. § 1391(c), which purports to apply for venue purposes generally.

Despite this settled interpretation, in 1990, the Federal Circuit jettisoned this Court's precedent based on a minor change in Section 1391(c)'s statement of its applicability. Whether the Federal Circuit's view was ever correct, which is highly dubious, in 2011, Congress again amended Section 1391, repealing the changes that undergirded the Federal Circuit's reasoning. The pertinent language is now materially identical to the language in effect when this Court last considered the proper scope of Section

1400(b) in *Fourco*. The Federal Circuit's holding below—relegating Section 1400(b) to insignificance—directly conflicts with this Court's precedent. This Court should grant certiorari and reverse, and thereby restore the balance that Congress struck in prescribing the appropriate venues for patent infringement cases, recognized by this Court in *Fourco*.

A. This Court Conclusively Interpreted The Patent Venue Statute In *Fourco*.

As recounted more fully in the Petition (at 9-11), in 1897, Congress passed a special patent venue statute designed as "a restrictive measure" to "limit[] a prior, broader venue" and to "define the exact limits of venue in patent infringement suits." *Stonite Prods. Co.* v. *Melvin Lloyd Co.*, 315 U.S. 561, 566 (1942). As that 1897 Act's primary sponsor noted, its "main purpose" was to restrict patent venue to districts where a defendant had "established" a "permanent agency," as opposed to anywhere where "[i]solated cases of infringement" had occurred. 29 Cong. Rec. 1900 (daily ed. Feb. 16, 1897) (statement of Rep. Lacey); *see* Pet. 11.

In *Stonite*, this Court held that Section 48 of the Judicial Code, derived from the 1897 Act, was "the exclusive provision controlling venue in patent infringement proceedings" and is not "supplemented by § 52 of the Judicial Code," a general venue provision. 315 U.S. at 561-63. In 1948, Congress re-codified Section 48 as 28 U.S.C. § 1400(b), with some immaterial word changes. *See Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 225-26 (1957).

Then, in *Fourco*, the Court held that Section 1400(b), like its predecessor, stands alone. 353 U.S.

at 229. The Court overruled the Second Circuit, which had held that Section 1400(b) should be read in light of a new provision, 28 U.S.C. § 1391(c), which the court of appeals had viewed as "defin[ing] ... corporate residence" in all venue provisions. *Fourco*, 353 U.S. at 223-24 (citation omitted); *see* Pet. 12-13. Section 1391(c) stated that "any judicial district in which [a corporation] is incorporated or licensed to do business or is doing business ... shall be regarded as the residence of such corporation for venue purposes." *Fourco*, 353 U.S. at 223. The Court held that this section did not apply to patent venue. *Id.* at 228. However "clear and generally embracive" Section 1391(c) is, Section 1400(b) is "equally clear." *Ibid.* Ultimately, Section 1391(c) "is a general corporation venue statute" which does not affect the "special venue statute," Section 1400(b). *Ibid.* Section 1400(b) "is complete, independent and alone controlling." *Ibid.*

Fourco thus reaffirmed *Stonite*'s holding that the special patent venue statute stands on its own and is not to be read in light of any definition in the general venue statute. *Fourco*, 353 U.S. at 223-24, 228-29. The Court reaffirmed *Stonite* because Congress's later re-codifications and revisions to the patent venue statute were not "substantive." *Id.* at 225-28. Thus, *Fourco* "h[e]ld that 28 U.S.C. § 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions, and that it is not to be supplemented by the provisions of 28 U.S.C. § 1391(c)." *Id.* at 229. The same logic remains true today.

Under *Fourco*'s stand-alone interpretation of Section 1400(b), a corporation is resident in "the state of

incorporation only." *Fourco*, 353 U.S. at 226. That is how corporate residence was understood when the patent venue statute was enacted, and Congress has not amended that definition (as it did for actions arising under different laws). *Ibid.* (citing *Shaw* v. *Quincy Mining Co.*, 145 U.S. 444, 449 (1892)). Patent-infringement lawsuits may therefore be brought only where the defendant is incorporated "or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b); *Fourco*, 353 U.S. at 223.

B. The Federal Circuit Departed From This Court's Interpretation Based On A Non-Substantive Linguistic Change That, In Any Event, Congress Has Since Repealed.

This Court's word remained the law of patent venue until 1990, when the Federal Circuit found *Fourco* no longer to be controlling. *See VE Holding Corp.* v. *Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990). The court of appeals concluded that a 1988 revision to Section 1391(c), which had changed "for venue purposes" to "[f]or purposes of venue under this chapter," required that court to reexamine the interplay of Section 1391(c) and Section 1400(b) "as a matter of first impression." *Ibid.*

The Federal Circuit reasoned that the statutory language interpreted in *Fourco* was "nonspecific," and that "Section 1391(c) as it was in *Fourco* is no longer." *VE Holding*, 917 F.2d at 1579. Believing the interpretative slate to be blank, the court of appeals wrote that "Section 1391(c) applies to all of chapter 87 of title 28,

and thus to § 1400(b), as expressed by the words 'For purposes of venue under this chapter.'" *Id.* at 1580.

Whether or not *VE Holding*'s reasoning was correct when it was decided—and it likely was not (*see* Pet. 3-4, 24-25)—in 2011, Congress revised Section 1391(c) again to make it materially identical to the version this Court already had interpreted in *Fourco*. *See* Pet. App. 4a-5a. The version of Section 1391(c) in effect when *Fourco* was decided stated that its corporate residency provisions applied "for venue purposes." 353 U.S. at 323. The version in effect since 2011 says "[f]or all venue purposes." Pet. App. 5a. This language is the same except for the addition of "all." Here, "the word[s] '[venue purposes]' ha[ve] no different meaning and can be ascribed no different function in the context of § [1391(c)] than would the words 'all [venue purposes].'" *Train* v. *City of New York*, 420 U.S. 35, 44 (1975). Both are equally "non-specific"; in context, they mean the same thing. *VE Holding*, 917 F.2d at 1579. Gone are the words "under this chapter" that *VE Holding* held to be the "exact and classic language of incorporation" and thus dispositive. *Ibid.*; *see also* Pet. 6.

Therefore, because there is "no substantive change" from the language this Court interpreted in *Fourco*, *Fourco* is still controlling. 353 U.S. at 228. Indeed, that was the very reason *Fourco* gave for reaffirming *Stonite*: Even though the language of the statute had altered, these revisions did not on net effect a "substantive change" in the statute. *Ibid.*; *see also* Pet. 11-13.

If anything, the revisions to Section 1391 since *Fourco*—there have been no revisions to Section

1400(b)—confirm *Fourco*'s holding that Section 1391's general provisions defining corporate residence do *not* apply to Section 1400(b). The 2011 amendment to Section 1391 not only deleted the change that *VE Holding* held dispositive (917 F.2d at 1579); it also added affirmative language explicitly providing that Section 1391 applies "*[e]xcept* as otherwise provided by law" (28 U.S.C. § 1391(a) (emphasis added)). Because Section 1400(b), as interpreted by this Court, is a different provision of law, providing "otherwise" than the general corporate residency provisions of Section 1391(c), Section 1400(b)—and not Section 1391(c)—governs, just as it did in *Fourco*. *Fourco* remains the law. *See* Pet. 26-27.

C. This Court's Interpretation Of Patent Venue Warrants *Stare Decisis* Treatment.

That *Fourco* is still the law is reason enough that the Federal Circuit was compelled to decide this case differently. As the Petition explains, the court of appeals was bound to "follow" *Fourco* unless and until this Court overturns it. Pet. 14 (citation omitted). Yet the Federal Circuit now effectively has reversed *Fourco*, enforcing the opposite of its holding in all cases "arising under" the patent laws. 28 U.S.C. § 1295(a)(1).

This Court should grant certiorari to correct the Federal Circuit's error, and reaffirm *Fourco*. *Fourco* warrants *stare decisis* treatment.

"*[S]tare decisis* in respect to statutory interpretation has 'special force.'" *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008). "Then, unlike in a constitutional case, critics of our ruling can take

their objections across the street, and Congress can correct any mistake it sees." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). "All" of this Court's "interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme." *Ibid.* So a "special justification" is necessary to overrule *Fourco*. *Ibid.* If it "has not been undermined by subsequent changes or development in the law," it should be followed. *See Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989).

Far from being undermined, *Fourco* was correctly decided and remains correct today. The patent venue statute permits suit "in *the* judicial district where the defendant resides." 28 U.S.C. § 1400(b) (emphasis added). *The* judicial district where a defendant resides is the place where it is incorporated. *Brunette Mach. Works, Ltd.* v. *Kockum Indus., Inc.*, 406 U.S. 706, 707 n.2 (1972); *see also* Pet. 23. As this Court reaffirmed in the years since *Fourco*, this result "is not affected by § 1391(c), which expands for general venue purposes the definition of the residence of a corporation," because "Congress placed patent infringement cases in a class by themselves, outside the scope of general venue legislation." *Brunette*, 406 U.S. at 711-13. Congress had ample opportunity to revise or eliminate Section 1400(b), but—as explained in Section I.B, *supra*—it has declined to do so, instead confirming that Section 1391(c) does not apply.

In addition, as the petition explains, only this Court's interpretation of the patent venue statute can be squared with other statutory provisions. The Federal Circuit's reading would define "residency" differently for venue purposes (in Section 1400(b)) than for service of process (in 28 U.S.C. § 1694). *See* Pet. 25,

29-30. And it would render nugatory Section 18(c) of the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284, 331 (2011), which provides that an automatic teller machine is not "a regular and established place of business." If a company's *residency* could be established by locating allegedly infringing ATMs in a district, as the Federal Circuit would have it, then this provision would be without force. *See* Pet. 28-29.

In short, there is no reason to think that Congress has overruled *Fourco*, and much reason to think that Congress has instead acted as if it is "part of the statutory scheme." *Kimble*, 135 S. Ct. at 2409. This Court should reverse the decision below and reaffirm that *Fourco* is still the law.

II. THE UNSEEMLY ABUSE OF THE FEDERAL CIRCUIT'S PATENT VENUE RULE COMPELS THE COURT'S INTERVENTION.

Without this Court's review, the Federal Circuit has let go of the reins that Congress placed on patent venue over a century ago. Since 1990, patent plaintiffs have had their choice to sue in any of the country's 94 district courts, without meaningful limit. The consequences have been dreadful: As numerous scholars, inventors, and producers have long noted, unscrupulous patentees have taken full advantage of their ability to dictate the rules, norms, and judges that will govern the litigation they bring. Non-practicing entities, in particular, have chosen to litigate in districts that accord their allegations favorable treatment, in both procedure and substance.

This forum shopping is transforming patents from tools to encourage innovation into weapons with

which to threaten productive companies. Today, successful innovators who contribute their wares to the market often are rewarded with lawsuits alleging infringement of weak patents filed in courts that will all but guarantee a trial. Fight or settle, the innovative company faces a hefty bill, a drag on its engineers' time and focus, and the risks of legal uncertainty. Thanks in large part to forum shopping, patent litigation is now a significant cost of, and deterrent to, innovation.

A. The Federal Circuit's Loose Venue Standard Has Generated Rampant And Unseemly Forum Shopping.

The Federal Circuit's 1990 decision in *VE Holding* did not merely misinterpret the patent venue statute. It also removed the bulwark against forum shopping that had been in place for the prior century. *VE Holding* has enabled non-practicing entities to file suit virtually anywhere in the country.

VE Holding held that Section 1391(c) governs venue in patent cases. 917 F.2d at 1579-84; *accord* Pet. App. 4a. That section provides that a corporation or other legal entity may be sued wherever it is "subject to the court's personal jurisdiction." 28 U.S.C. § 1391(c)(2); *see also VE Holding*, 917 F.2d at 1578, 1584. Subsequent decisions of the Federal Circuit have deemed nearly any location where infringement occurs sufficient for "personal jurisdiction"—and thus also sufficient to satisfy Section 1391(c)(2). Under Federal Circuit law, "purposefully shipp[ing] the accused [product] into [the forum] through an established distribution channel" may be enough to subject a defendant otherwise unconnected with the forum to

suit there. *Beverly Hills Fan Co.* v. *Royal Sovereign Corp.*, 21 F.3d 1558, 1565 (Fed. Cir. 1994).

As now-Judge (and author of the decision below), then-Professor, Kimberly Moore explained, these "liberalizations of the jurisdiction and venue statutes, combined with the technological feasibility and ease of national commerce, have greatly expanded the plaintiff's choice of forum, which in turn has intensified and facilitated forum shopping. This means that national corporations may be sued in virtually any U.S. district court." Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. Rev. 889, 897 (2001); *see also* Pet. 18 & n.7.

The expansive reach of patent venue is an especially large problem for technology companies, whose products and services—which increasingly are sold online or are themselves online—are available nationwide. "Companies that offer products nationally are likely to be subject to the personal jurisdiction of a large number of U.S. district courts, if not all ninety-four." Jonas Anderson, *Congress as a Catalyst of Patent Reform at the Federal Circuit*, 63 Am. U. L. Rev. 961, 986 (2014) ("Anderson 2014"). Amicus Dell's experience is a case-in-point. Dell Inc. is incorporated in Delaware, with its headquarters in Round Rock, Texas, in the Western District of Texas. In the last ten years, it has been sued for patent infringement in those forums, combined, 57 times. By contrast, Dell has been sued for patent infringement in the Eastern District of Texas, alone, 150 times. Similarly, EMC has been sued for patent infringement in its home forum of Massachusetts just twice in the last ten years, compared with sixteen suits in the Eastern District of

Texas. This disparity is a direct result of the Federal Circuit's expansion of the patent venue statute.

Many of those suits in inconvenient venues are brought by "patent trolls." Technology companies like amicus are especially likely to find themselves the target of trolls armed with weak but broad and vague patents. "Software patents may account for over ninety percent of troll[s'] most-litigated patents." Debra Brubaker Burns, *Titans and Trolls Enter the Open-Source Arena*, 5 Hastings Sci. & Tech. L.J. 33, 65 (2013). Technology startups, too, have become targets of patent trolls—largely because patent litigation can be disproportionately disruptive to such nascent firms. *See* Colleen Chien, *Startups and Patent Trolls*, 17 Stan. Tech. L. Rev. 461, 464, 472-78 (2014). In the technology industry especially, demands and lawsuits from patent trolls "unsettle the operation of small companies," including by impacting their funding. Garry A. Gabison, *Spotting Software Innovation in A Patent Assertion Entity World*, 8 Hastings Sci. & Tech. L.J. 99, 135 (2016).

This Court has recognized that patent "[t]rolls," which "are entities that hold patents for the primary purpose of enforcing them against alleged infringers," harm the patent system by "exacting outsized licensing fees on threat of litigation." *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1935 (2016). The Court has responded to the "seriousness" of this problem (*ibid.*) with decisions that empower district courts with tools to minimize such harm. *E.g.*, *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014). The Executive Office of the President too has warned that, "[e]ven if patent assertion entities do not prevail in the courtroom, their actions

can significantly reduce incremental innovation while litigation is ongoing, a situation that can persist for years." Executive Office of the President, *Patent Assertion and U.S. Innovation* 10 (2013), http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf; *accord*, *e.g.*, James Bessen et al., *The Private and Social Costs of Patent Trolls,* 34 Regulation, Winter 2011-2012, at 26.

Such unscrupulous "plaintiffs frequently attempt to capitalize on their virtually unencumbered choice of venue to shop for the best district courts to file their suits. This environment has destabilized the patent system." Kevin A. Meehan, *Shopping for Expedient, Inexpensive & Predictable Patent Litigation*, 2008 B.C. Intell. Prop. & Tech. F. 102901, 102901. Plaintiffs have used their virtually boundless choice of forum to concentrate lawsuits in a few inconvenient courts. Last year, over 40% of all lawsuits alleging patent infringement were filed in the Eastern District of Texas—a venue with few people and little connection to the technology industry (beyond patent lawsuits). *See* Pet. 5. Commentators have recognized that the Federal Circuit's "permissive" interpretation of the "patent venue provision" is partially responsible for this imbalance. Anderson 2014, *supra*, at 985.

That district is, in particular, the chosen forum for the worst patent-infringement lawsuits—patent trolls asserting broad and vague patents on ideas for software. *See* EFF CAFC Br. 4-5; Joe Mullin, *Trolls Made 2015 One of the Biggest Years Ever for Patent Lawsuits*, ArsTechnica (Jan. 5, 2016), http://arstechnica.com/tech-policy/2016/01/despite-law-changes-2015-saw-a-heap-of-patent-troll-lawsuits. In 2015, one of the most active years of patent litigation, over

two-thirds of cases were filed by non-practicing entities—and those non-practicing entities chose the Eastern District of Texas for over 60% of their targets. *See* RPX, *2015 NPE Activity Highlights* 4-5, 9 (2016), http://www.rpxcorp.com/wp-content/uploads/sites/2/2016/01/RPX-2015-NPE-Activity-Highlights-FinalZ.pdf. The District of Delaware stands at number two. *See id.* at 9; Pet. 5.

These courts are "almost always inconvenient," and far from the locus of the infringing activity. Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 260 (2016). For example, the Eastern District of Texas is remote from most technology companies and population centers; thus, many witnesses are "unnecessarily inconvenienced by having to travel away from home to testify in the Eastern District of Texas." *In re Genentech, Inc.*, 566 F.3d 1338, 1344 (Fed. Cir. 2009). Indeed, even though amicus Dell is headquartered in Texas, the frequent suits it faces in Marshall, Texas, "300 miles from" its headquarters, are highly inconvenient; the overwhelming majority of the witnesses and sources of proof are outside the Eastern District. *See In re Acer Am. Corp.*, 626 F.3d 1252, 1254-56 (Fed. Cir. 2010).

Yet trolls devise vulpine strategies to defeat motions to transfer brought under 28 U.S.C. § 1404(a)—and choose courts that are likely to bless their strategies. Klerman & Reilly, *supra*, at 260-63. For example, a patent troll "transported copies of its patent prosecution files" into East "Texas office space" and successfully argued to the Eastern District of Texas that the suit should remain in that court rather than moving to a court where the defendant, with its nu-

merous employees and witnesses, maintained its principal place of business. *In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1381-82 (Fed. Cir. 2010).

When a court denies transfer, defendants' only recourse is mandamus, which requires showing that the district court clearly abused its discretion in applying a multifactor test. *See In re TS Tech USA Corp.*, 551 F.3d 1315, 1318-19 (Fed. Cir. 2008). This "even higher burden" than ordinary review of discretionary district court decisions (*id.* at 1319) makes it difficult for the court of appeals to correct even blatant errors. Yet the Federal Circuit has discovered many cases that meet this threshold. Since *TS Tech*, it has begun rectifying a handful of the most egregious transfer denials. *See* Klerman & Reilly, *supra*, at 260-61; *see also*, *e.g.*, Pet. 22-23; EFF CAFC Br. 9-10. Indeed, it has granted mandamus to order transfer 17 times since *TS Tech*, while all other courts of appeals have done so only 5 times *combined*. That is so even though the Federal Circuit applies the same law as those regional circuits. *See TS Tech*, 551 F.3d at 1319. The Federal Circuit has needed to resort to mandamus so often because patent cases are filed in manifestly inconvenient venues more frequently than other cases.

Still, "serial patent litigants, such as non-practicing entities and their counsel" have persisted in their "manipulation of venue" via tricks that have enabled them to avoid mandamus. Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 Ind. L. Rev. 343, 388 (2012). Thus, patent trolls have been able to select the district of their choice for their lawsuits—even though their suits have "no connection whatsoever to the district" (Klerman & Reilly, *supra*, at 261-63)—

and remain fairly assured that their choice of a plaintiff-friendly forum will stick.

B. Forum Shopping Is The Root Of Many Problems In Patent Law.

Patent plaintiffs choose one or two districts in which to sue because those districts favor them. *See* EFF CAFC Br. 4-6. These courts sometimes "requir[e] parties to submit briefs to seek permission to file summary judgment motions" or simply maintain "a norm shared by the district's judges to grant summary judgment motions rarely." J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. Pa. L. Rev. 631, 655, 674-75 (2015) ("Anderson 2015").

Nearly a decade ago, commentators already recognized that "some districts appear to be competing for patent litigation" by adopting practices favorable to patent asserters. Meehan, *supra*, at *4-5. The competition has exacerbated in recent years. Unsurprisingly, patent trolls select districts that deny summary judgment at much greater rates than the national average. Klerman & Reilly, *supra*, at 253. Trolls' favored courts also place procedural impediments to both motions to dismiss and motions for summary judgment. *Id.* at 253 & n.48. These courts find themselves reversed at higher rates. *Id.* at 280; Teresa Lii, *Shopping for Reversals: How Accuracy Differs Across Patent Litigation Forums*, 12 Chi.-Kent J. Intell. Prop. 31, 43-45 (2013). Simply put, patent trolls select courts that are less likely to follow Rules 12 and 56, at least when handling a patent case.

Such courts will also refuse to stay the case pending dispositive motions (such as motions to dismiss) while ordering expensive discovery and proceeding

with other onerous briefing (such as claim construction). Klerman & Reilly, *supra*, at 263-65, 268-70. A defendant faced with these hefty burdens of litigation—even if its case should have been dismissed at the outset—often will elect to settle rather than fight.

The incentive to settle is especially strong given the outsized damages awards patent defendants are subject to in plaintiff-friendly courts. *See* Anderson 2015, *supra*, at 653; Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 Yale J. L. & Tech. 193, 211-12 (2007) (collecting examples). Such courts dominate the list of largest patent verdicts:

Year	Plaintiff	Defendant	Technology	Award (in $M)	Court
2009	Centocor Ortho Biotech Inc.	Abbott Laboratories	Arthritis drugs	$1,673	E.D. Tex.
2007	Lucent Technologies	Microsoft Corporation	MP3 technology	$1,538	S.D. Cal.
2012	Carnegie Mellon University	Marvell Technology Group	Noise reduction on circuits for disk drives	$1,169	W.D. Penn.
2012	Apple Inc.	Samsung Electronics Co.	Smartphone software	$1,049	N.D. Cal.
2016	VirnetX Inc.	Apple Inc.	Smartphone software	$625	E.D. Tex.
2005	Cordis Corp.	Medtronic Vascular	Vascular stents	$595	D. Del.
2015	Smartflash LLC	Apple Inc.	Media storage	$533	E.D. Tex.

2004	Eolas Technologies Inc.	Microsoft Corp.	Internet browser	$521	N.D. Ill.
2011	Bruce N. Saffran, M.D.	Johnson & Johnson	Drug-eluting stents	$482	E.D. Tex.

Today, district courts may, at "their discretion," multiply these damages. *Halo*, 136 S. Ct. at 1934. The potential for even larger verdicts now looms over defendants.

Thus, even where the asserted patents are weak, patent trolls can expect to extract significant rents from productive companies by bringing or threatening lawsuits in favorable districts. *See* Acushnet CAFC Br. 10; Anderson 2015, *supra*, at 655-56. The result is a significant tax on innovation—the opposite of the goal of the patent system. *See* Executive Office of the President, *supra*, at 6, 9-12. As a direct consequence of this tax and the "waste[] [of] resources" attendant to "increasing litigation costs," forum shopping "decrease[s] innovation" by chilling competitors, who will "systematically over-comply with the scope of the patent holder's exclusive right, consistently expanding the property right beyond what was intended when the patent was granted." Moore, *supra*, at 924-30; *see also* Pet. 19-22 & nn.8-14.

Beyond coercing unjust settlements, forum shopping generates other pernicious consequences. "Forum shopping confounds and complicates litigation by selectively creating pockets of district courts that apply the law in a nonuniform manner," worsening "the problem that patent suits already face of accurate application of the law." Lii, *supra*, at 39. These courts are "more inaccurate at applying patent law than other districts." *Id.* at 45.

Subjecting more cases to less accurate results is reason enough to discourage forum shopping. Further, accuracy aside, the "unpredictability and inconsistency in the application of the law among the district courts" that follows from courts' disparate willingness to grant dispositive motions against patentees is a problem of its own. Moore, *supra*, at 924. "This instability erodes public confidence in the law and its enforcement and creates doubt about the fairness of the system." *Ibid.*

No radical reform is needed to alleviate these ill effects of forum shopping. This Court need only return the standard for patent venue to the one Congress enacted, and this Court has enforced, for over a century.

CONCLUSION

The Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted.

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